In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3931

BURRELL JOHNSON, *Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA, *Defendant in Error*

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

The defendant, a resident of Seattle for many years, married and owning his own business, owner of a Studebaker automobile, left Seattle in September, 1921, travelling with his wife across country

and arrived in Providence, Rhode Island, in the afternoon of November 7, 1921. Having previously attempted to trade his car, he read in a Providence paper an advertisement giving a local address where a car for trade could be found. The following day he called at this location, a private house, the street number of which he can not recall, and a Nash car was exhibited to him by the man living in the premises; he examined the car and they finally agreed to trade machines, the defendant to pay a $300.00 difference in cash. The defendant paid down $50.00 to bind the bargain, agreed to make the trade if a license was issued to him and, accompanied by the owner of the Nash, visited the office of the State Board of Public Roads, State House, Providence, R. I., and applied for a license on the Nash; he filled out the blank furnished him, giving his correct name and residence address. (Pltff's Ex. No. 4.) He was informed that some time must elapse between the filing of the application and the issuance of the license and he thereupon requested that it be mailed to him. Driving his Studebaker, he and his wife left Providence and drove to Leominster, Mass. to visit relatives. Four days later he returned, found the license in the post-office, and accompanied by his wife, drove to the residence of the Nash own-

er. He again examined the car and, noting nothing unusual about it, exchanged his Studebaker for it and paid over the balance of the cash; at this time each man drove the other's car around the block as a final demonstration. Each then delivered to the other an informal bill of sale and the defendant and his wife drove away in the Nash. They stopped to visit an aunt in Hartford, Conn., and drove down the East coast through New York, Washington and other cities, stopped at several Nash agencies for repairs, and then reached Miami, Florida. Here, because of an altercation with a newsboy, the defendant was arrested for violation of a city ordinance; he gave his true name and address and the police, having seized the Nash car, wired to Seattle, verified his statements and released the car to him; here the wife attempted to show the police the bill of sale but was unable to find it. Thereafter he drove leisurely to California, arriving there January 15, 1922; here he exchanged his Rhode Island license for a California tourist permit, giving his correct name and address, and drove up the coast arriving in Seattle, February 14, 1922. The following day, an agent of the Department of Justice, looking over cars, interviewed him at his place of business; the defendant explained his trip and the

manner of acquiring the Nash, stating that the bill of sale was lost. Within the next few days he, at the request of the agent, visited the latter's office at least twice and the police station once, and again explained the situation; then he drove the car to the local Nash agency and at this shop, after taking down some of the parts, it was discovered that the number shown on the parts, viz. 82424, did not agree with the number shown on the detachable number plate which was 85678. The car was then seized and thereafter the defendant visited the office of the special agent at least twice, attempting to recover the car. The defendant was later indicted for a violation of the Act of October 29, 1919, the National Motor Vehicle Theft Act, for transporting an automobile in interstate commerce "well knowing that the said motor vehicle had been theretofore stolen" and trial was had on June 5, 1922.

Wilfred H. Crabtree, of Boston, Mass., at the trial, identified the car as belonging to him and alleged that on November 10, 1921, he left it on the Street in Boston and that he never saw it again until the day of trial.

E. J. Romano, an auto repairman of many years experience, examined the car on March 16, 1922, at

police headquarters, and testified that the number plate showed no evidence of having been injured or tampered with.

W. E. Worsham, a government witness, testified that there was nothing particularly suspicious looking about the car.

Witnesses having been heard, the defendant was found guilty and sentenced to imprisonment for two years. The defendant, at the close of the government's case, challenged the sufficiency of the evidence to sustain the charge, and the motion was overruled and an exception was allowed. The defendant, at the close of all the evidence, again challenged the sufficiency thereof and moved for a directed verdict of acquittal and was overruled and an exception was allowed. After verdict the defendant moved to set aside the verdict and for a new trial and was overruled and an exception was allowed.

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STATUTE REFERRED TO IN THIS CASE

SECTION 3, ACT OF OCTOBER 29, 1919

"That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both." (41 Stat. L. 325.)

SPECIFICATIONS OF ERROR

Each specification is supported by an assignment, duly presented and filed with the writ of error and will be found on pages 13, 14 and 15 of the transcript of record.

I

The court erred in refusing to sustain the motion for dismissal made at the close of the government's case.

II

The court erred in refusing to direct a verdict of not guilty at the close of all the evidence and in al-

lowing the case to go to the jury and in refusing to instruct the jury to acquit the defendant.

III

The court erred in denying the motion for a new trial and in entering judgment and sentence herein.

BRIEF OF ARGUMENT

The defendant maintains that this is a conviction depending upon circumstantial evidence and that the testimony produced failed entirely and completely to show that he ever had any knowledge that the car was stolen, even in the event that the proof showed it to be a stolen car.

The defendant maintains that all the testimony is consistent with his innocence and is therefore insufficient to sustain the conviction.

In *Isbell v. United States*, 227 Fed. 788 at 792, in discussing the duty of the court in a circumstantial evidence case upon motion for a directed verdict, the court says:

"It is certain that evidence of facts as consistent with innocence as with guilt is not sufficient to sustain a conviction, and that at the close of every trial

by jury it is the duty of the court upon request to consider and determine whether or not there is any substantial evidence of the guilt of the accused, and, if there is none, to instruct the jury to return a verdict for the defendant. If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt."

In *Kasle v. United States*, 233 Fed. 878 at 887, the court, in discussing the test of the sufficiency of the evidence in a prosecution for receiving stolen goods, says:

"One of the tests was in effect that a person who receives property, which in fact is stolen property, under circumstances which would put a reasonable and honest man upon inquiry, is chargeable with such knowledge in that behalf as would have come to him had he made such reasonable inquiries, touching the source of the property, as would have occurred 'to an honest man of average intelligence.' Another test was that one receiving personal property is chargeable with the particular effect of 'those circumstances attending his reception of the property,' which, in the judgment of the jury, 'should have been deemed by him at the time to be suspicious and suggestive that the title' of the transferor 'was open to question.'

"Plainly such tests as these of guilty knowledge on the part of the accused subjected him to a stand-

ard of conduct and of capacity to detect crime, which the jury might conclude to be the standard of reasonable and honest men of average intelligence when acting under circumstances like those which might be found to have existed here. The effect of such tests was to charge the accused with guilty knowledge or not upon what the jury might find would have induced belief in the mind of a man such as they were told to consider, rather than the belief that was actually created in the mind of the accused; or, at last, the accused might be condemned even if his only faults consisted in being less cautious or suspicious than honest men of average intelligence are of the acts of others. The result of the rule of the charge would be to convict a man, not because guilty, but because stupid."

In *People v. Razezicz*, 206 N. Y. 249, 269, 99 N. E. 557:

"In a criminal case, circumstantial evidence to justify the inference of guilt must exclude to a moral certainty, every other reasonable hypothesis. Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence, or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will account for all the facts proven. Much less does it afford a just ground for conviction that, unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery."

The testimony shows that the defendant was a stranger in Providence and did only what any man

would do. He examined the car and agreed to trade, in the event that he secured a license; the man in possession, living in the premises went with him and helped secure the license; every act of the defendant was the usual and common procedure. The testimony of witness Romano (p. 40 Tr.) and witness Worsham (p. 44 Tr.) shows that there was nothing unusual about the car. The defendant gave his correct name and address in the license application and this certainly demonstrates his good faith. He drove through many cities and made no effort to hide the car; the fact that he visited Nash agencies is proof of good faith; they would be the most likely places where information on a stolen car would be found; it is well known that every agency maintains a list of stolen cars. He again gave his correct name and address when he received the California license and then he furnished all the information he could to the special agent who finally seized the car. True, he can not produce the bill of sale, but in touring the country, it was lost or mislaid; his explanation is ample and it is a fact that hundreds of cars are bought and sold and no evidence of title is preserved; the defendant can not be convicted simply because he is stupid or careless. How many car owners can produce their bill of sale on demand?

Possession of personal property is usually regarded as sufficient evidence of title. The defendant, in purchasing the car and at all times since, acted openly and publicly, without any attempt at concealment and the greatest inference that can be drawn is that there may have been some lack of precaution. But what more could any purchaser do? He paid for it, secured a license and dealt with the man in possession. No ordinary buyer would go further; no ordinary man insists that the engine be disassembled so that the numbers may be compared, and the only way that the car in this case was checked was done in this manner.

If the defendant knew the car was stolen, his natural impulse would have been to change its appearance; the record shows that the same oil can, the same curtains and the same color remained; the marks of identification used by the government were apparent all the time and could readily have been changed, at no expense and without the assistance of any mechanic. If he had had a guilty knowledge, he would have remembered exactly the name and address of the man who sold it to him, for that would have been easy to supply and a thief never has any trouble in producing a bill of sale. The very facts urged by the government against

him are in his favor for the reason that there is nothing unusual about them; he was a stranger in Providence, visited innumerable towns on his trip, and had no reason to perfect a record as he went along. The defendant is a married man, holds a responsible position (Tr. p. 41), and his reputation is good. Every fact in the case points clearly and conclusively to the good faith of the defendant and the government's case is founded entirely on suspicions and inferences and it attempts to convict because of lack of precautions.

It does not appear that the defendant changed the number or ever knew it was changed; the government simply infers that, it having been changed, the defendant did it; not having the bill of sale, and having told the truth about it when first questioned, the government infers there was none and points to it as a circumstance indicating guilty knowledge; the government ignores the perfectly regular conduct of the defendant and wherever two inferences are possible, adopts the one calculated to sustain the conviction.

As said in *State v. Pienick*, 46 Wash. 522 at page 526:

"No man ought to be convicted of a crime upon mere suspicion, or because he may have had an op-

portunity to commit it, or even because of bad character, and where circumstances are relied on for a conviction they ought to be of such a character as to negative every reasonable hypothesis except that of the defendant's guilt. And a new trial should be granted where a conviction is had on evidence not connecting the defendant with the crime beyond reasonable doubt. * * *

"Where a chain of circumstances leads up to and establishes a state of facts inconsistent with any theory other than the guilt of the accused, such evidence is entitled to as much weight as any other kind of evidence, but the chain, as it were, must be unbroken, and the fact and circumstances disclosed and relied upon must be irreconcilable with the innocence of the accused in order to justify his conviction."

An exactly similar case arose in Michigan, *People v. Neilson*, 183 N. W. 707. It appears from the opinion that the defendant purchased a car, previously stolen; he asked the usual questions, made a small down payment, took a bill of sale, paid the balance and drove the car freely about the city. Upon inquiry, he drove the car to the police station and was then arrested for receiving a stolen automobile knowing it to be stolen. Quoting from the opinion:

"A particular point urged by the people, as showing guilty knowledge, is that he changed the appear-

ance of the car. He put on a bumper, painted his initials on the car doors, and fixed an emblem of a fraternal society in the radiator top. We think these acts were innocent, and commonly done by owners of cars. And a discrepancy in the date of the bill of sale is urged. This was not explained. Defendant did not notice it. It might have been due to the fact that the bill was prepared some days before delivery. It might have been an error of the attorney. From this incident, guilty knowledge in this case may not be inferred, nor upon this record can it be inferred, that defendant had knowledge that the number of the car had been changed before he purchased it."

In *Davis v. State*, 193 Pac. (Okla.) 745, at 746, the defendant was convicted of receiving an automobile knowing the same to be stolen. Quoting from the opinion:

"The cross-examination of defendant elicited certain suspicious circumstances showing that, had defendant made a more thorough examination into the ownership of the car, he could have in time discovered, perhaps, that the person who gave his name as Miller was not the true owner of the car. However, the court does not deem the inferences alone arising from lack of precaution to detrmine ownership sufficient by themselves to establish guilty knowledge on defendant's part at the time the car was received by him. In purchasing and taking possession of the car in question, defendant acted openly and publicly, without any attempt at con-

cealment, so far as this record discloses, and there is no fact or circumstance, other than inferences arising from such lack of precaution, shown which in any way directly tends to establish that defendant knew at the time that he was purchasing a stolen car. It is incumbent upon the state to prove every essential element of the crime by evidence beyond a reasonable doubt, and a conviction based upon circumstances which raise merely suspicions of guilt should not be allowed to stand. * * *

"In this case, the inferences properly arising from defendant's lack of precaution in investigating whether or not the seller was the true owner of the car, considered together with defendant's conduct immediately after he purchased the car, can not be said to point unerringly and conclusively to the guilt of defendant and to exclude every other reasonable hypothesis than that of guilt; and for such reasons it is the opinion of this court that the state has failed to establish guilty knowledge on the part of defendant by evidence sufficient to sustain the verdict and judgment."

And to the same effect are:

Worster v. State, 90 Southern (Fla.) 188.

Cohn v. People, 64 N. E. (Ill.) 306.

16 C. J. 763.

Roukous v. U. S., 195 Fed. 353.

The defendant contends that all the facts and circumstances are consistent with his innocence

and that it is not the intention of the statute to require a purchaser of an automobile to dismantle the same and discover a hidden number. The lower court erred in failing to direct a verdict for the defendant and it is respectfully submitted that the plaintiff in error is entitled to a dismissal or reversal to the end that justice may be done.

Respectfully submitted,

R. J. MEAKIM,

Attorney for Plaintiff in Error.